Supreme Court, U.S.
FILED

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No.

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

Trung Van Tran, *Petitioner,*

v.

Department of Revenue,
State of Oregon, *Respondent.*

On Petition for a Writ of Certiorari to the
Oregon Supreme Court

PETITION FOR A WRIT OF CERTIORARI

JOHN ERIC WILKES
Counsel of Record
388 State Street, Suite 600
Salem, Oregon 97301
(503) 362-8402
Attorney for Petitioner

QUESTION PRESENTED

1. Whether in light of this Court's decision in *Phillips v. Commissioner*, 283 U.S. 589 (1931), the State of Oregon violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution by denying Oregon taxpayers an opportunity to contest an erroneous tax deficiency after assessment by paying the tax, penalty and interest and filing a claim for refund.

2. Whether the State of Oregon violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution by denying Oregon taxpayers with an opportunity for a judicial determination of a denial of a claim for refund.

LIST OF PARTIES

Only those parties identified in the caption to this petition were parties in the Oregon Tax Court and Supreme Court of Oregon.

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Trung Van Tran respectfully petitions for a writ of certiorari to review the judgment of the Oregon Supreme Court in this case.

OPINIONS BELOW

The opinion of the Oregon Supreme Court (App. at 2a) is reported at 320 OR 170, 880 P.2d 924 (1994). The opinion of the Oregon Tax Court (App. at 9a) is not reported. The administrative decision of the Oregon Department of Revenue is contained in Appendix D (App. at 11a).

JURISDICTION

The Supreme Court of Oregon entered its opinion on September 29, 1994 and denied Petitioner's Petition For Reconsideration on November 1, 1994. This petition is, accordingly, filed within the time allowed by law. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "[N]or shall any State deprive any person of liberty, or property, without due process of law. . . . .

STATUTORY PROVISIONS INVOLVED

Oregon Revised Statute 305.270 is entitled **Refund of**

excess tax paid; claim procedure. That statute provides in pertinent parts as follows:

> "(1)* * * if the amount of tax shown as due on a report or return originally filed with the department * * * *or collected pursuant to ORS 305.620, or as corrected by the department is less than the amount theretofore paid, or if a person files a claim for refund of any tax paid to the department within the period specified in subsection (2) of this section, any excess tax paid shall be refunded by the department with interest as provided in this section and ORS 314.415."
>
> "(2)* * * * The claim shall be filed within the period specified in ORS 314.415(1)(b) for taxes specified * * *."

ORS 314.415 (1)(b) provides in part that "No refund shall be allowed or made after three years from the time the return is filed, or two years from the time the tax or a portion thereof, was paid, whichever period expires the later, unless before the expiration of such period a claim for refund is filed by the taxpayer in compliance with ORS 305.270, * * * *"

STATEMENT OF THE CASE

It is the practice and procedure of the State of Oregon that Oregon taxpayers like petitioner are prohibited from contesting an erroneous or illegal deficiency tax assessment unless an appeal is

taken to the Director of the Oregon Department of Revenue within ninety days from the date of the original notice proposing the deficiency assessment.

Taxpayers who do not receive the original notice through no fault or procedural defect; or, who do not appeal because of language problems, family emergencies, illness, divorce, lack of information or lack of resources, have no ability to later obtain a review of an erroneous or illegal assessment after paying the tax, penalty and interest by filing a claim for refund.

On August 24, 1990, respondent issued a notice of deficiency assessment adjusting petitioner's Oregon 1986 and 1987 Oregon income taxes. The assessments were based upon respondent's determination that petitioner had failed to report a substantial amount of income for those two years, resulting in additional tax, penalty and interest of $23,721.42. Petitioner disputed the assessment stating that the unreported income was not income but loans and transfers of funds between bank accounts. However, petitioner, a Vietnamese refugee, did not fully understand the notice of deficiency assessment. Because of language and family problems, he did not file an appeal within the ninety day time period required by Oregon Revised Statute ("ORS") 305.280. Respondent then proceeded to collect the deficiency assessments by garnishment of his wages.

Petitioner filed claims for refunds for the taxes collected pursuant to Oregon's refund claim statute, ORS 305.270. On February 12, 1993, respondent conducted a telephone hearing regarding the claims. On June 1, 1993, respondent issued its Opinion and Order No. 92-4959 (App. at 13a) denying petitioner's claims for reason of lack of jurisdiction to hear the merits because ORS 305.280(2) provides for an appeal of a notice of deficiency assessment to be filed within ninety days of the date of the notice. The Opinion and Order acknowledged that petitioner has difficulty in understanding what he reads and that during the time period when respondent issued the notices of deficiency assessment he had a serious medical operation and his mother passed away creating a "traumatic time for him."

Petitioner acting through his accountant filed a complaint with the Oregon Tax Court appealing from respondent's Opinion and Order. Respondent filed a Motion to Dismiss for reason of failure to exhaust his administrative remedies. Petitioner did not file a response and the Oregon Tax Court issued its order granting the Motion to Dismiss on September 15, 1993. Petitioner then filed the following motions; Motion to Set Aside Order, Motion for Relief from Order, and Motion for Amended Complaint. Prior to filing these motions, petitioner had not been represented by legal counsel.

The Oregon Tax Court issued its order dated October 15, 1993 denying petitioner's motions. (App. at 9a) The Oregon Tax Court stated that "even assuming plaintiff should be excused from filing a response, the court will set aside its order only if plaintiff's claims entitle him to some relief." As to the merits of the jurisdictional question, the Oregon Tax Court ruled that "a taxpayer cannot sue for a refund after a notice of deficiency becomes final."

The Oregon Supreme Court affirmed. (App. at 2a) Petitioner filed a timely Petition for Reconsideration in that the court did not address the statute at issue (ORS 305.270) and refused to address the federal due process issues. The Oregon Supreme Court denied the Petition for Reconsideration on November 1, 1994. (App. at 1a)

REASONS FOR GRANTING THE PETITION

This petition presents questions of substantial public importance concerning the legality of states retaining taxes that they erroneously impose on taxpayers without providing them with an opportunity to obtain a judicial review. Currently, twelve states[1] and the District of Columbia do not permit taxpayers to challenge a notice of deficiency assessment by first paying the tax, and then

---

[1]Arkansas, Hawaii, Idaho, Montana, Nebraska, New Jersey, North Dakota, Oklahoma, Oregon, South Dakota, Vermont & West Virginia.

filing an amended return within the allowed statutory period for claiming a refund for the amount paid.

I. OREGON'S DENIAL OF ALTERNATIVE POSTDEPRIVATION APPEAL PROCEDURE VIOLATES THE DUE PROCESS CLAUSE.

Taxpayers do not always have the ability or capacity to appeal from the initial notice of deficiency assessment. Many times taxpayers do not appeal because they do not have the information or resources needed to appeal at the time of the notice of deficiency assessment. Others may have long since moved before the notice of deficiency assessment is issued and therefore do not get it because their forwarding address has expired. While the state has complied with its procedural requirements and may take action to collect its taxes, taxpayers are burdened with tax assessments which cannot later be challenged when they learn of the assessment through the collection actions being taken against them; or, when they have acquired the needed information or resources to contest the assessment.

This Court considered the issues raised in this case in deciding a similar federal taxation question involving due process requirements under the Fourteenth Amendment to the Constitution of the United States in the case of *Phillips v. Commissioner*, 283 U.S. 589 (1931). In *Phillips* the taxpayer argued that the

administrative transferee assessment violated the Constitution because the summary procedure did not provide for a judicial determination at the outset. Mr. Justice Brandeis writing for the court held that the summary collection procedure was constitutional because two alternative methods of eventual judicial review were available under the federal statute at issue. *Id.* at 597 (emphasis added). Specifically, the Court recognized that the statute provided taxpayers with an opportunity to obtain a judicial review by (1) either appealing from the determination of the Commissioner, or (2) having not appealed the assessment, paying the tax and bringing an action against the United States. *Id.* at 597-98.

Like the federal statute in *Phillips*, the Oregon Revised Statues provide for two alternative methods to obtain eventual judicial review. However, Oregon does not allow taxpayers to use one without simultaneously using the other. ORS 305.265 provides taxpayers with the opportunity to appeal the notice of determination of deficiency assessment to the Oregon Department of Revenue at the onset. ORS 305.270 provides taxpayers with the opportunity to later file claims for refund and to appeal denials of claims within the Oregon Department of Revenue. ORS 305.560 provides taxpayers with the opportunity to obtain a judicial review of any Order (with one exception which does not apply in this case) of the Oregon Department of Revenue arising under ORS Chapter 305.

Respondent argues that the administrative remedy by which taxpayers may appeal the notice of deficiency is sufficient to meet the requirements of due process. Petitioner disagrees for three reasons. First, the administrative process provides taxpayers with the opportunity to have a hearing before an Oregon Department of Revenue Hearings Officer prior to paying the tax. The determination of the Hearings Officer is not final in that it is subject to change by the Director of the Oregon Department of Revenue. Second, taxpayers may then appeal this determination to the Oregon Tax Court to obtain a judicial review of the assessment, but only after paying the tax or obtaining a hardship exception to the payment of the tax. Third, if taxpayers for any reason fail to appeal the deficiency assessment at the onset, they are prohibited from later paying the tax and filing a claim for refund and filing a complaint in the Oregon Tax Court. Respondent construes its refund claim statute to require taxpayers to pay the tax and file the claim during the same time period for filing an appeal of the notice of deficiency assessment. For reasons before stated this may not be possible or feasible. Thus, Oregon's refusal to provide its taxpayers with an alternative postdeprivation remedy to contest deficiency assessments and thereby provide them with an opportunity for a judicial determination of the legality and correctness of assessments imposed upon them cannot pass muster under the Due Process Clause of the United States Constitution.

II. OREGON DOES NOT PROVIDE TAXPAYERS WITH OPPORTUNITY TO OBTAIN JUDICIAL REVIEW OF TAX DEFICIENCY ASSESSMENTS.

This Court, in questions involving the legality of state tax assessments under the Constitution of the United States, has consistently held that taxpayers must be provided with an opportunity to obtain a meaningful review of the legality of assessments. *Reich v. Georgia*, 1994 WL 675214 (1994); *Harper v. Virginia Department of Taxation*, ___ U.S. ____, 113 S.Ct. 2510 (1993); *McKesson Corp. v. Div. Alcoholic Beverages and Tobacco*, 496 U.S. 18, 110 S.Ct. 2238 (1990).

This Court in *Reich v. Georgia* held that what a state specifically may not do is "hold out what plainly appears to be a 'clear and certain' postdeprivation remedy and then declare. . . that no such remedy exists." This is what Oregon is doing to its taxpayers. ORS 305.270 specifically provides taxpayers with the opportunity to contest tax assessments, including those corrected by the Oregon Department of Revenue, by paying the taxes first and then filing a claim for refund. There is no limitation in the refund claim statute indicating that this remedy is not available to taxpayers who did not appeal from the notice of deficiency assessment. Nor is there a requirement in the statute that the tax and refund claim be filed concurrently with an appeal of the deficiency. Accordingly, Oregon's practice of refusing to provide

its taxpayer's with the "clear and certain" remedy set fourth in ORS 305.270 cannot stand under this Court's decision in *Reich v. Georgia*.

III. PETITIONER EXHAUSTED ADMINISTRATIVE REMEDY BEFORE SEEKING JUDICIAL REVIEW.

Petitioner did not, as found by the Oregon Supreme Court, fail to exhaust his administrative remedies. As stated above, the Oregon statutes provide two alternative methods for appealing a notice of deficiency. While petitioner did not avail himself of the remedy of appealing the notice of deficiency assessment, he filed a proper and timely administrative claim for refund with respondent pursuant to ORS 305.270.

Petitioner is not arguing that he is entitled to two opportunities to obtain a judicial review of the correctness of the assessment imposed upon him. Rather he argues that the Oregon statutes provide him with two alternative administrative remedies and a procedure to obtain a judicial review after exhausting the remedy selected. Further he argues that federal due process requires that Oregon provide him with the alternative to obtain a judicial review if he does not appeal the initial assessment determination by later paying the tax, penalty and interest and filing a claim for refund within the time required in the refund statutes.

IV. PETITIONER RAISED CONSTITUTIONAL DUE PROCESS QUESTION BEFORE THE OREGON SUPREME COURT.

Petitioner properly raised the constitutional issue of due process before the Oregon Supreme Court. The Oregon Supreme Court reviewed petitioner's case on questions of fact and law de novo. ORS 305.445; ORS 19.125. The question of respondent violating the due process rights of petitioner arose when the Oregon Tax Court refused to address the merits of his complaint by dismissing it on purely jurisdictional grounds. Petitioner was not allowed to file his amended complaint with the Oregon Tax Court, or present any further argument.

The Oregon Supreme Court erred in refusing to review the constitutional due process issues involved in petitioner's case. This is especially true given the fact that petitioner was proceeding without legal counsel when he filed his complaint and when the Oregon Tax Court dismissed it. Further, the court's refusal to review the federal due process question when it was brought before the court in petitioner's briefs and petition for reconsideration is not appropriate given the harm caused to Oregon taxpayers by a constitutionally flawed appeal process.

To obtain a judicial review of a deficiency tax, Oregon not only requires that the tax be paid first - but that it be paid during the same period that the taxpayer is pursuing his predeprivation

remedy. Accordingly, if the taxpayer is unable to appeal the deficiency at the onset, no judicial review is allowed. The requirement that the tax be paid first, in and of itself, does not cause Oregon's appeal procedure to be constitutionally defective. The defect occurs because Oregon does not provide its taxpayers with an alternative postdeprivation appeal procedure to protect them from having to pay erroneous and illegal taxes.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Supreme Court of Oregon should be granted.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF OREGON

TRUNG VAN TRAN,	)	Oregon Tax Court
	)	No. 3437
Plaintiff-Appellant,	)	
	)	
v.	)	SC S40774
	)	
DEPARTMENT OF REVENUE, State of Oregon,	)	
	)	
	)	
Defendant-Respondent.	)	

The court has considered the petition for reconsideration and orders that it be denied.

Dated this 1st day of November, 1994.

/s/Wallace P. Carson JR
WALLACE P. CARSON, JR.
CHIEF JUSTICE

c: Clayton Patrick
John Eric Wilkes
Jerry Bronner

APPENDIX B

FILED: September 29, 1994

IN THE SUPREME COURT OF THE STATE OF OREGON

TRUNG VAN TRAN,

Appellant,

v.

DEPARTMENT OF REVENUE,

State of Oregon,

Respondent.

(OTC 3437; SC S40774)

In Banc

On appeal from the Oregon Tax Court.

Carl N. Byers, Judge.

Argued and submitted September 1, 1994.

Clayton C. Patrick, of Patrick & Meadowbrook, Salem, argued the cause and filed the briefs for appellant.

Jerry Bronner, Assistant Attorney General, Salem, argued the cause for respondent. With him on the brief was Theodore R. Kulongoski, Attorney General, Salem.

Graber, J.

The judgment of the Tax Court is affirmed.

Taxpayer appeals from a judgment of the Tax Court. The

relevant facts are not in dispute.[1]

On August 24, 1990, the Department of Revenue (Department) sent notices of assessment to Taxpayer, adjusting his 1986 and 1987 Oregon individual income tax returns. Taxpayer did not appeal from the notices of assessment to the Department within 90 days of the date of the notices.

Taxpayer paid a portion of the assessed taxes. In January 1992, he filed amended Oregon individual income tax returns for 1986 and 1987. Those amended returns claimed a refund. In February 1992, Taxpayer also sent the Department a letter appealing from the August 24, 1990, notices of assessment that concerned his 1986 and 1987 income taxes.

The Department concluded that it lacked jurisdiction to consider the merits of Taxpayer's 1992 appeal, because he had failed to appeal within 90 days of the August 24, 1990, notices of assessment. Accordingly, the Department declined to consider the merits of Taxpayer's position with respect to his 1986 and 1987 individual income taxes.

Taxpayer then filed a complaint in the Tax Court. The department moved to dismiss the complaint on the grounds that Taxpayer had failed to exhaust administrative remedies. The Tax Court dismissed the complaint on that grounds. Taxpayer appealed

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[1] ORS 19.125; ORS 305.445

to this court, and we now affirm the dismissal of Taxpayer's complaint by the Tax Court.

The statutes pertinent to our analysis allow a person in Taxpayer's situation to appeal an assessment to the Department within 90 days of the date of the notice, after which the assessment becomes final. Those statutes also require the exhaustion of administrative remedies before a taxpayer may invoke the jurisdiction of the Tax Court.

> ORS 305.265(14) provides, in part:
> "Assessments and billings of taxes shall be final after the expiration of the appeal period specified in ORS 305.280, and payment of the tax shall not give any person any extension of the period within which an appeal may be taken."

ORS 305.280(2), referred to in the foregoing passage, provides that an appeal from any notice of assessment issued by the Department with respect to individual income taxes "shall be filed within 90 days from the date of the notice." Under those statutes, the assessment sent to Taxpayer became final and non-appealable after 90 days - - more than a year before Taxpayer challenged them.

Furthermore, ORS 305.275.(4) provides that, with certain exceptions that do not apply here,

> "no person shall appeal to the Oregon Tax Court or other court on any matter arising under the revenue and tax laws administered by the department unless the person first exhausts the administrative remedies provided before

the department and the director."

This court has construed the exhaustion-of-remedies requirement of that statute to include the filing of a timely appeal with the Department. In Elbert v. Dept. of Rev., 307 Or 649, 652-53, 771 P2d 1018 (1989), this court said:

> "In Jackson v. Dept. of Rev., 298 Or 633, 637, 695 P2d 923 (1985), 'Exhaustion of remedies' [in ORS 305.275(4)] was construed to include filing a timely appeal with the department. We held that allowing a taxpayer to evade administrative review simply by failing to file a timely administrative appeal would 'deny the statutory scheme and mock the legislative purpose.' Id. The present case is no different. [Taxpayer's] failure to file a timely administrative appeal is a waiver of his right to judicial review.
>
> "* * * * *
>
> "* * * Timely filing an [administrative] appeal is the sine qua non of the process. Once a timely appeal has been filed the department has statutory authority to decide the issue * * * . *
>
> * * In the present case, [Taxpayer] never properly invoked [the Department's] appellate authority and was not entitled to a hearing on the merits either by a Department of Revenue Hearing Officer or by the Tax Court."

The same reasoning applies here and yields the same result.

Taxpayer admits that he did not act in a timely manner to exhaust administrative remedies under the above-cited statutes, but he argues that ORS 305.419 provides an alternative administrative

route for a taxpayer who pays an individual income tax assessment and then claims a refund. Specifically, Taxpayer argues that an assessment is "final" under ORS 305.265(14) only for the purpose of collection the amount assessed and that ORS 305.419 has the same effect as the federal statutes that, he asserts, allow a taxpayer to claim a refund after an assessment has become "final" and the tax has been paid.[2]

ORS 305.419 provides, in part:

> "(1) Except as provided in subsection (3) of this section, in any appeal from an order of the department involving a deficiency of taxes imposed upon or measured by net income, the tax assessed, and all penalties and interest due, shall be paid to the department on or before the filing of a complaint with * * * the Oregon Tax Court * * *. The complaint shall be filed as a claim for refund.
>
> "* * * * * *
>
> "(3) Where payment of the tax, penalties and interest would be an undue hardship, plaintiff may file an affidavit alleging undue hardship with the complaint. If the tax court finds undue hardship, it may stay all or any part of the payment of tax, penalty and interest required under subsection (1) of his section. * * *

---

[2] Taxpayer also argues that his reading of ORS 305.265 to 305.280 and ORS 305.419 is compelled if those statues are to comport with federal due process. Taxpayer did not make that argument in the Tax Court, so we will not consider it.

> "(4) If, in any appeal to the Oregon Tax Court for which payment of tax, penalty and interest assessed is required before filing of a complaint, the tax court orders that all or any part of the amount paid be refunded by the department, the amount so ordered to be refunded shall bear interest * * *." (Emphasis added.)

That section, both by its plain terms and when considered in the context of related procedural statutes concerning notices of assessment (ORS 305.265 to ORS 305.280), applies only after the completion of a taxpayer's administrative appeal of a notice of assessment to the Department. It does not have any bearing on the initial requirement to appeal to the Department within 90 days. Accordingly, ORS 305.419 does not avail Taxpayer here.

The judgment of the Tax Court is affirmed.

APPENDIX C

IN THE OREGON TAX COURT

Income Tax

No. 3437

TRUNG VAN TRAN,)
)
Plaintiff,)
)
v.)
)
DEPARTMENT OF REVENUE,)
State of Oregon,)
)
Defendant.)

ORDER

This matter is before the court on plaintiff's Motion to Set Aside Order, Motion for Relief from Order, and Motion for Amended Complaint.

Plaintiff filed a Complaint on June 9, 1993, appealing from defendant's Opinion and Order No. 92-4959. Defendant then filed a Motion to Dismiss for failure to exhaust administrative remedies. Plaintiff did not file any response to defendant's motion. On September 15, 1993, the court issued its order granting defendant's Motion to Dismiss. Plaintiff now contends that he failed to respond through a mistake or excusable neglect because he relied on the advice of a person he thought

was a member of the Oregon State Bar. Even assuming plaintiff should be excused from filing a response, the court will set aside its order only if plaintiff's claims entitle him to some relief.

Plaintiff's failure to exhaust his administrative remedies consisted of his failure to timely appeal from the notice of assessment. Defendant's notice of assessment, adjusting plaintiff's 1986 and 1987 individual income tax returns, was issued August 24, 1990. Plaintiff had 90 days to appeal or contest that notice. ORS 305.280(2). Plaintiff's letter of appeal was received by the department February 12, 1992, over one year late. Plaintiff's memorandum claims that he filed claims for refunds on Form 40X in January, 1992.

Construing these facts most favorably to plaintiff, they fail to state a claim. Essentially, plaintiff argues that Oregon's procedures for contesting an assessment and for claiming a refund are two separate procedures. Plaintiff asserts that by repealing ORS 314.455, Oregon adopted the federal practice which allows a taxpayer to claim a refund after the assessment has become final. However, Oregon's procedures for assessments and refunds are different from the federal procedures. See Stokes v. Dept. of Rev., 11OTR 56 (1988). Under Oregon's procedures, a taxpayer cannot sue for a refund after a notice of deficiency becomes final.

> "When a return is filed and a deficiency assessment made under ORS 305.265, subsection (13) of that statute limits the period for contesting the tax

> liability to that specified in ORS 305.280. If a taxpayer who pays a deficiency assessment is allowed to file a claim for refund and relitigate liability for the taxes, this would have the effect of extending the time to appeal."

Estate of Frances Tate v. Dept. of Rev., 10 OTR 343, 346 (1987).

Plaintiff admits in his Complaint that he did not appeal to defendant within the 90-day period.

Based on the above, the court finds that all of plaintiff's motions should be denied. Now, therefore,

IT IS ORDERED that plaintiff's Motion to Set Aside Order, Motion for Relief from Order and Motion for Amended Complaint are denied.

Dated this 14 day of October, 1993.

/s/Carl N. Byers
Judge

APPENDIX D

STATE OF OREGON

DEPARTMENT OF REVENUE

In the Matter of the Appeal of Trung Van Tran Concerning Personal Income Tax Matters for the 1986 and 1987 Tax Years.	)))))	OPINION AND ORDER No. 92-4959

A telephone hearing was held on February 12, 1993, at 10 a.m. before Linda Mathewson, Hearings officer for the Oregon Department of Revenue.

At issue is whether the department has jurisdiction to hear the merits of Mr. Tran's appeal. Petitioner appealed a Notice of Assessment issued August 24, 1990, by the department adjusting petitioner's 1986 and 1987 Oregon returns for unreported income. Petitioner appealed in a letter received February 12, 1992.

Present at the hearing were:

1. Kenneth J. Wachter, CPA, representing the petitioner; and
2. Larry Boyd, representing the Audit Division.

Statement of the Facts

Mr. Boyd testified that the audit was initiated in October 1988, by an auditor who is no longer with the department. It was transferred to another auditor in Salem Field who transferred to

another division so that Mr. Boyd was then given the file to finish the audit. Mr. Boyd explained that 7 or 8 letters had been sent to the petitioner and to his representative requesting the necessary information to complete the audit. Apparently, information regarding bank accounts and deposits needed to complete the audit. The only adjustment made to petitioner's returns was to reflect unreported income.

Mr. Wachter explained that Mr. Tran is Vietnamese and, although he does speak English, sometimes he has difficulty understanding what he reads. Mr. Tran sells spring rolls to restaurants. In 1986, he opened a USDA approved processing plaint to make these spring rolls. He had problems during 1988, 1989, and 1990 with competition from other manufactures so that his business wasn't doing very well and from his relatives who were stealing from him. In June 1990, Mr. Tran had a serious operation and his mother died so that so that this was a traumatic time for him. Mr. Wachter says that he lost track of Mr. Tran until January 1992 which is when Mr. Tran brought in the notices from the department and they were explained to him. Mr. Wachter says the bank statements and financial statements were supplied to the auditor to verify the income. He knows that Mr. Tran does not have the amount of unreported income that the department adjusted for.

Mr. Boyd explained that when he took over the audit there were no records available. Apparently, any records that had been

supplied were looked at by the previous auditors. Mr. Boyd only proceeded to ask for missing records necessary to complete the audit.

Conclusion of the Department

ORS 305.280(2) provides in part:

> An appeal. . . .from any . . .notice of assessment issued by the Department of Revenue . . .shall be filed within 90 days from the date of the notice. . .

The department issued the Notices of Assessment on August 24, 1990, for tax years 1986 and 1987. Petitioner had 90 days to file his appeal. The letter requesting a hearing was not filed until February 12, 1992, more than 90 days after the date of the Notice of Assessment.

As the court ruled in Utgard v. Comm., 1 OTR 274, 282, 283:

> If you believe the assessment erroneous, you must appeal. . . .within the time prescribed by the statutes, or . . . .forever be barred from questioning the assessment. . . .

While the department sympathizes with the stressful events going on in petitioner's live during this time, since no timely appeal was filed, the department does not have jurisdiction to hear the merits of this appeal. The appeal is denied.

The amount now due and owing is:

Tax Year	Tax	5% Penalty	Warrent Fee	Interest to 4/15/93	Payment
1986	$11,357.00	$567.85	$10.00	$11,145.70	11,029.60

Balance	Interest per day
$12,050.95	$3.74

The 1987 amount is paid.
Add $3.74 of interest per day after April 15, 1993.

IT IS SO ORDERED.
Dated and mailed at Salem, Oregon this 1st day of June, 1993.

DEPARTMENT OF REVENUE

/s/Richard A. Munn
RICHARD A MUNN, DIRECTOR

Notice: If you want to appeal this decision, file a complaint in in the Oregon Tax Court, 520 Justice Building, Salem, Oregon 97310. YOUR COMPLAINT MUST BE

FILED WITHIN 60 DAYS AFTER THE MAILING DATE SHOWN ABOVE, OR THIS DECISION WILL BECOME FINAL AND CANNOT BE CHANGED.

Before you file a complaint with the Tax Court, you must pay the Department of Revenue the tax assessed, penalties and interest due, in the amount shown in this opinion and order. ORS 305.419.

File your appeal as a claim for refund with the regular division of the Tax Court. ORS 305.560. However, upon a showing of undue hardship, the Tax Court may stay all or part of the payment.